In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-247

NACIREMA OPERATING COMPANY, INC., and LIBERTY MUTUAL INSURANCE COMPANY, PETITIONERS

v.

JERRY C. OOSTING, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This is an action under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.*, brought by an employer and its insurance carrier to set aside a compensation order entered by the respondent Deputy Commissioner in favor of an injured longshoreman.

The longshoreman settled a civil action against a ship-owner as a third party tort-feasor, in which the employer was impleaded as a third party defendant, for $112,170. Of this amount, petitioners received $10,293.55 as reimbursement for the medical expenses and compensation already incurred, and the longshoreman's attorney received $37,025.35. The Deputy Commissioner in the instant case found that the longshoreman was totally disabled by his work-related injury, and awarded him continuing compensation payments of $70 a week. In accord with the direction of 33 U.S.C. 933(f) that the "amount recovered against" a third party tortfeasor is to be deducted from his compensation under the statute, the Commissioner credited $64,851.10, the net amount recovered by the longshoreman in his civil suit, against the award.[1]

The district court set aside the Commissioner's order, and credited $110,000 against the award, holding that the "amount recovered against" the tortfeasor was the gross amount, less reimbursement to petitioners for the benefits previously paid, but not less the longshoreman's attorney's fees. The court of appeals reversed and reinstated the Deputy Commissioner's award (Pet. App. C), holding the district court's decision inconsistent with the Act and its legislative history and contrary to past decisions of the courts and other Deputy Commissioners.

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[1] In effect, weekly compensation payments must be made by petitioners beginning in about 17 years (Pet. App. 12a).

2. The holding below is correct and further review is unwarranted. In 1959, Congress amended the Longshoremen's and Harbor Workers' Compensation Act to permit the injured longshoreman himself to sue the person responsible for his injury if the tortfeasor is neither his employer nor a fellow employee. Act of August 18, 1959, Pub. L. No. 86-171, 73 Stat. 391.[2] The legislative history of these amendments shows that Congress did not intend that the injured longshoreman would receive double compensation from his suit but rather that "an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery [in a tort suit]." S. Rep. No. 428, 86th Cong., 1st Sess., p. 2. As the court of appeals held (Pet. App. 13a), "The amendments * * * were not intended to change the basic concept of the Act, which secures at least the full amount of statutory compensation for the injured worker."

The decision below, upholding the deduction of an employee's reasonable attorney's fees and expenses from the gross amount recovered, is correct. The decision properly implements the legislative policy of insuring that the injured worker will receive the full

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[2] This Act, *inter alia*, amended 33 U.S.C. 933(f), which formerly permitted only the employer to sue the third party. However, there was no change in the language directing payment by the employer of the excess of the statutory award "over the amount recovered against such third person," and thus no indication of congressional intent to change the settled administrative and judicial interpretation of that phrase (Pet. App. 13a-14a).

amount of statutory compensation during the period of his industrial disability and is in accord with the decisions of other courts. See *Stark* v. *Shell Oil Co.*, 450 F. 2d 994 (C.A. 5); *Voris* v. *Gulf-Tide Stevedores, Inc.*, 211 F. 2d 549 (C.A. 5), certiorari denied, 348 U.S. 823; *Independent Stevedore Co.* v. *Stocker*, 292 F. Supp. 354 (D. Ore.); *Seaboard Marine Service Corp.* v. *Quigley*, 159 F. Supp. 27 (S.D.N.Y.), affirmed, 266 F. 2d 822 (C.A. 2), certiorari denied *sub nom. Peterson* v. *Seaboard Marine Service Corp.*, 361 U.S. 830.[*]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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[*] Petitioners' claim that this decision is inconsistent with those in other circuits ignores the clear distinction in the cases between deficiency judgments, such as this and the ones cited above, and distribution cases, such as those cited by petitioners (and collected in footnote 10 of the opinion below at Pet. App. 15a), in which the courts have held that the equitable lien of the employer and his insurance carrier for reimbursement of payments already made for medical and related compensation has priority over the lien of the employee's attorney for his reasonable fee. The instant case is not inconsistent with the distribution cases, since the employer and insurer have been repaid in full for their medical and compensation expenses.

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